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No. 30

In the Supreme Court of the United States

OCTOBER TERM, 1942

LAWRASON RIGGS, JR., SPECIAL GUARDIAN,
PETITIONER,
v.
GIOVANNI DEL DRAGO, ET AL.

ON WRIT OF CERTIORARI TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Introductory.—Section 124 of the New York Decedent Estate Law (c. 709, Laws of 1930, see Appendix, *infra*, pp. 13–16) provides in effect that, except as otherwise directed by the decedent's will, the burden of any federal death taxes paid by an executor shall be spread proportionately among the distributees or beneficiaries of the estate. The Court of Appeals of the State of New York, in a 4–3 decision (287 N. Y. 61, 38 N. E. (2d) 131), held that the state statute was unconstitutional in that it was in conflict with the federal estate tax law and in particular with Section 826 (b) of the Internal Revenue Code. (See Appendix, *infra*, pp. 12, 13.)

Of course, if there were any conflict between the state and federal statutes the former would have to give way. Cf. *United States* v. *Texas,* 314 U. S. 480; *United States* v. *Snyder,* 149 U. S. 210. We think, however, that there is no such conflict here, and in the circumstances we feel that it is appropriate to submit a brief statement of our views.

1. *The nature of the federal estate tax and Section 826* (b).—The federal estate tax was first enacted as part of the Revenue Act of 1916 (39 Stat. 756) and has been continuously in existence since that time. It was last reenacted as part of the Revenue Act of 1926 (44 Stat. 9), and thereafter, together with subsequent amendments, was incorporated in the Internal Revenue Code (53 Stat. 1).

Unlike the death taxes imposed by the federal government during the preceding century (see *Knowlton* v. *Moore,* 178 U. S. 41; *Scholey* v. *Rew,* 23 Wall. 331), the present tax is not an inheritance tax upon the receipt of property by the survivors, but is an estate tax upon the transmission of the entire net estate by the decedent. The rate is graduated according to the size of the net estate, which in turn is computed by subtracting from the gross estate such deductions as administration expenses, debts, etc. In theory, the tax is to be carved out of the estate prior to distribution, and the estate as thus reduced is then

ready for ultimate division among the survivors. See *Y. M. C. A.* v. *Davis*, 264 U. S. 47.

Obviously, the collection of the tax reduces the amounts that would otherwise be distributed to the various survivors. The federal statute, however, does not undertake in any manner to specify how the estate, as thus reduced, shall be distributed. It contemplates simply that the tax will be paid out of the estate as a whole, and that the applicable state law as to the devolution of property at death will then determine how the remainder is to be distributed.[1] As was said by Cordell Hull, one of the proponents of the first estate tax in the House of Representatives (53 Cong. Rec. 10657):

> Under the general laws of descent the proposed estate tax would be first taken out of the net estate before distribution, and distribution made under the same rule that would otherwise govern it. * * *

Although the federal statute thus contemplated that the tax would be paid out of the estate before

[1] Normally, under the law of most states, the weight of the tax would be felt by the residuary legatee or devisee. *Corbin* v. *Townshend*, 92 Conn. 501, 103 Atl. 647; *People* v. *Northern Trust Co.*, 289 Ill. 475, 124 N. E. 662; *Brown's Estate* v. *Hoge*, 198 Iowa 373, 199 N. W. 320; *Plunkett* v. *Old Colony Trust Co.*, 233 Mass. 471, 124 N. E. 265; *Amoskeag Trust Co.* v. *Trustees of Dartmouth College*, 89 N. H. 471, 200 Atl. 786. However, there might not be any residuary beneficiaries in some wills, or the residuary estate might be so small that the tax would have to cut into other legacies or bequests. But, whatever the situation, it is state law which governs the effect of the tax upon the various distributive shares.

distribution, it was recognized that distribution might actually be made in some cases before payment of the tax and that it was therefore necessary to authorize collection from any distributee.[2] However, out of fairness to any distributee that might thus be called upon to pay the tax, Section 826 (b) of the Internal Revenue Code provides that such person "shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate * * *." It seems evident from these provisions that Congress was simply attempting to protect a distributee against bearing a greater portion of the burden of the tax than he would otherwise have sustained had the tax been carved out of the estate prior to distribution. And any doubt on this question is removed by the final clause of Section 826 (b) which specifically states that it is "the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its dis-

[2] If the tax is not paid on or before the due date, the collector is authorized by Section 826 (a) of the Internal Revenue Code to proceed against the property of the decedent, and Section 827 (a) provides that the tax shall be a lien for ten years upon the gross estate of the decedent.

tribution."[3] In short, these provisions simply declare that the ultimate thrust of the tax shall be the same as though it had first been taken out of the estate, thus leaving to state law what that ultimate thrust shall be.[4]

Accordingly, we think that the provision of the New York statute which spreads the burden of the Federal tax proportionately among the distributees is in no way inconsistent with the Federal statute. Indeed, it was the purpose of the Federal statute not to become involved in the rights of the distributees *inter sese* but to leave that question to the decedent himself and to state law. See statement of Congressman Kitchin, 53 Cong. Rec., Appendix, part 15, p. 1942. Section 826 (b) merely underscores the state law by emphasizing that the rights of a distributee shall not be af-

[3] The court below appeared to treat the term "estate" as referring to the residuary estate. However, there is no warrant for thus departing from the plain language of the statute; the term "estate" should be read in the same way that it is used throughout the statute, as referring to all the property of the decedent, including the property used to pay specific and general legacies as well as residuary bequests. Such appeared to be the understanding of this Court in *Y. M. C. A.* v. *Davis*, 264 U. S. 47, 50, 51.

[4] Further support for this conclusion is found in the provision giving the distributee a right of "reimbursement * * * by a just and equitable contribution." Presumably a "just and equitable contribution" would be the amount by which the contributor's share would have been reduced had the tax been paid prior to distribution. But the amount by which his share would have been reduced is by its very nature a question of state law.

fected by the fact that the tax has been collected from him in the first instance.

2. *Neither the legislative history nor the Treasury regulations with respect to Section 826 (b) show that Congress intended to prevent a state from fixing the ultimate burden of the tax among the survivors.*—(a) The provisions of Section 826 (b) originally appeared in substantially identical form as the third sentence of Section 208 of the Revenue Act of 1916, which read in full as follows:

> SEC. 208. That if the tax herein imposed is not paid within sixty days after it is due, the collector shall, unless there is reasonable cause for further delay, commence appropriate proceedings in any court of the United States, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto. If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out

of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

It will be observed that the first two sentences dealt with the collection of the tax by judicial proceedings against the decedent's property in cases where the tax had not been paid when due. Since Section 207 imposed upon the executor the duty of paying the tax on or before the due date, the first two sentences of Section 208 obviously contemplated the situation where the executor had failed to pay the tax and particularly where he had already made distribution. However, out of fairness to a distributee who might thus be called upon to pay the tax, the third sentence seeks to protect him against being left with a smaller portion of the decedent's estate than would have been the case had the tax first been paid out of the estate before distribution. But the statute does not undertake to dictate how the estate shall

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be distributed after the tax has been paid out of it.[5]

That Congress understood local law as governing the distribution of the estate after payment of taxes is confirmed by Section 812 (d) of the Internal Revenue Code. In spelling out the method of computing the deduction with respect to charitable bequests, etc., Section 812 (d) provides:[6]

> * * * If the tax imposed by section 810, or any estate, succession, legacy, or

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[5] Only in the limited area occupied by Section 826 (c) has Congress undertaken to deal with the distribution of the burden of the estate tax among the survivors. Subsection (c) deals with life insurance receivable by a beneficiary other than the executor. The proceeds of such a policy in excess of $40,000 are included in the decedent's gross estate, although they do not pass through the executor's hands, and the beneficiary is required by subsection (c) to make a proportionate contribution towards the tax. The provisions embodied in (c) first appeared in Section 408 of the Revenue Act of 1918, 40 Stat. 1057, which for the first time specifically provided for the inclusion of life insurance proceeds in the decedent's gross estate (Section 402 (f)).

[6] These provisions were first enacted in Section 303 (c) of the Revenue Act of 1924 (43 Stat. 253) and were intended as a legislative reversal of *Edwards* v. *Slocum*, 264 U. S. 61. They were repealed about two years later by Section 323 (a) of the Revenue Act of 1926 (44 Stat. 9), but were subsequently restored to the estate tax law by Section 807 of the Revenue Act of 1932 (47 Stat. 169). The correctness of the dictum in the *Slocum* case (264 U. S. at 63) that the burden of the tax was to be determined by state law was, however, recognized by the amendatory provisions. The amendatory provisions are before the Court in *Harrison* v. *Northern Trust Co.*, No. 103, present Term, certiorari granted, October 12, 1942.

> inheritance taxes, are, either by the terms of the will, *by the law of the jurisdiction under which the estate is administered*, or by the law of the jurisdiction imposing the particular tax, *payable in whole or in part out of the bequests, legacies,* or devises otherwise deductible under this paragraph, then the amount deductible under this paragraph shall be the amount of such bequests, legacies, or devises reduced by the amount of such taxes. * * * [Italics supplied.]

And the reports of the House and Senate Committees which considered these provisions expressly recognize that "local law" determines the ultimate impact of the estate tax. See H. Rep. No. 708, 72d Cong., 1st Sess., p. 49; S. Rep. No. 665, 72d Cong., 1st Sess., p. 52. See also Article 44 of Regulations 68 and Regulations 80; Section 81.44 of Regulations 105.

Although none of the committee reports specifically deal with the question here presented, such light as they do shed fails to disclose any intention to forbid a state from regulating the mode of distribution of the estate after payment of taxes.

(b) Nor do the Treasury regulations afford any support for the result reached by the New York Court of Appeals. Section 81.84 of Regulations 105 provides:

> SEC. 81.84 *Right to reimbursement.*—If any portion of the tax is paid by or col-

lected out of that part of the estate passing to, or in the possession of, any person other than the duly qualified executor or administrator, such person may be entitled to reimbursement, either out of the undistributed estate or by contribution from other beneficiaries whose shares or interests in the estate would have been reduced had the tax been paid before distribution of the estate, or whose shares or interests are subject either to an equal or prior liability for the payment of taxes, debts, or other charges against the estate. The executor is entitled to require beneficiaries under insurance policies to bear their proportion of the tax. These provisions, however, are not designed to curtail the right of the Commissioner to collect the tax from any person, or out of any property, liable therefor. The Commissioner cannot be required to apportion the tax among the persons liable, nor to enforce any right to reimbursement or contribution.

These provisions were first adopted in 1922 as Article 85 of Regulations 63, and have been continued without substantial change to the present time. Article 87, Regulations 68, Regulations 70 (1926 and 1929 eds.) and Regulations 80 (1934 and 1937 eds.). The importance of these regulations is negative in character, for the Treasury has consistently taken the position, at least since

1922,' that it had no interest in the distribution of the burden of the tax, except in the case of life insurance where the statute is explicit.

CONCLUSION

Section 826 (b) was designed merely to afford relief to a distributee who had been compelled to pay more than his fair share of the tax, measured by the amount that his portion of the estate would have been diminished had the tax been carved out of the estate prior to distribution. Congress did not intend to foreclose a state from regulating the distribution of the estate after the tax had been taken out. The provisions of Section 124 of the New York statute are not inconsistent with the federal estate tax law.

Respectfully submitted.

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' The early regulations, prior to that time, were of a somewhat experimental character, and it is difficult to extract from them any uniform pattern. See Regulations 37 (1916 ed.), Articles 17 and 26; Regulations 37 (1917 ed.), Articles 31 and 37; Regulations 37 (1919 ed.), Articles 65 and 98.

APPENDIX

Internal Revenue Code, 53 Stat. 1:

SEC. 826. COLLECTION OF UNPAID TAX.

(a) SALE OF PROPERTY.—If the tax herein imposed is not paid on or before the due date thereof the collector shall, upon instruction from the Commissioner, proceed to collect the tax under the provisions of general law; or appropriate proceedings may be commenced in any court of the United States having jurisdiction, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto. This subsection insofar as it applies to the collection of a deficiency shall be subject to the provisions of sections 871 and 891.

(b) REIMBURSEMENT OUT OF ESTATE.—If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose

interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

(c) LIABILITY OF LIFE INSURANCE BENEFICIARIES.—If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio. [U. S. C., Title 26, Sec. 826.]

Laws of New York (1930), c. 709:

§ 124. *Apportionment of federal and State estate taxes; executor or administrator to deduct taxes from distributive shares.*

1. Whenever it appears upon any accounting, or in any appropriate action or proceeding, that an executor, administrator, temporary administrator, trustee or other person acting in a fiduciary capacity, has paid a death tax levied or assessed under the provisions of article ten-c of the tax law, or under the provisions of the United States revenue act of nineteen hundred twenty-six, as amended by the United States revenue act of nineteen hundred twenty-eight, or under any death tax law of the United States hereafter enacted, upon or with respect to any property re-

quired to be included in the gross estate of a decedent under the provisions of any such law, the amount of the tax so paid, except in a case where a testator otherwise directs in his will, shall be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues. Such proration shall be made by the surrogate in the proportion, as near as may be, that the value of the property, interest or benefit of each such person bears to the total value of the property, interests and benefits received by all such persons interested in the estate, except that in making such proration allowances shall be made for any exemptions granted by the act imposing the tax and for any deductions allowed by such act for the purpose of arriving at the value of the net estate; and except that in cases where a trust is created, or other provision made whereby any person is given an interest in income, or an estate for years, or for life, or other temporary interest in any property or fund, the tax on both such temporary interest and on the remainder thereafter shall be charged against and be paid out of the corpus of such property or fund without apportionment between remainders and temporary estates. For the purposes of this section the term "persons interested in the estate" shall have the same meaning with respect to both state and federal taxes as is given it by section two hundred forty-nine-m of the tax law.

So far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid by the executor as such

out of the estate before its distribution. In all cases in which any property required to be included in the gross estate does not come into the possession of the executor as such, he shall be entitled, and it shall be his duty, to recover from whomever is in possession, or from the persons interested in the estate, the proportionate amount of such tax payable by the persons interested in the estate with which such persons interested in the estate are chargeable under the provisions of this section, and the surrogate may by order direct the payment of such amount of tax by such persons to the executor.

No executor, administrator or other person acting in a fiduciary capacity shall be required to transfer, pay over or distribute any fund or property with respect to which a federal or state estate tax is imposed until the amount of such tax or taxes due from the devisee, legatee, distributee or other person to whom such property is transferred is paid, or, if the apportionment of tax has not been determined, adequate security is furnished by the transferee for such payment.

2. The surrogate, upon making a determination as provided in subdivision one of this section, shall make a decree or order directing the executor or other fiduciary to charge the prorated amounts against the persons against whom the tax has been so prorated insofar as he is in possession of property or interests of such persons against whom such charge may be made and summarily directing all other persons against whom the tax has been so prorated or who are in possession of property or

interests of such persons to make payment of such prorated amounts to such executor or other fiduciary.

3. This section shall not apply to estates of persons dying prior to September first, nineteen hundred thirty.

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